



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10
1200 Sixth Avenue
Seattle, WA 98101

APR 28 2000

Reply To
Attn Of: OAQ-107

Mr. John Key
General Manager
Cominco Alaska, Inc.
P.O. Box 1230
Kotzebue, Alaska 99752

Re: Generator MG-17 Construction Schedule and Cominco's
Request for Stay

Dear Mr. Key:

This letter responds to your March 14, 2000, letter to Chuck Clarke and Larry Hartig's letter to Julianne Matthews of the same date requesting a stay of the March 7, 2000, Order to Cominco Alaska Inc. (Cominco) and the December 10, 1999, Order to the Alaska Department of Environmental Conservation (ADEC). The letter from Larry Hartig also indicated that if EPA did not stay the Orders then Cominco requested authorization under paragraph 52.a.(xi) to put the MG-17 module on the concrete foundation at the Red Dog Mine site and to install or connect other services to the module.

First, your stay request and EPA's response are discussed at length in the recent documents filed in the pending ninth circuit litigation. As explained in those documents, EPA's position is that a stay is not appropriate.

Second, since a stay is not appropriate, I will address Cominco's request to put the MG-17 module on the concrete foundation on site at the Red Dog facility and to conduct other pre-permit activities. This request involves the issue of which construction activities may be conducted prior to issuance of a valid PSD permit. In December 1978, EPA issued a policy memorandum addressing this issue. (enclosed) That memorandum explains that the Clean Air Act allows certain pre-permit activities, such as planning, ordering of equipment and material, site-clearing, grading, and on-site storage of equipment and materials. The memo further explains the Act prohibits on-site activities of a permanent nature aimed at completing a PSD source (including, but not limited to, installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature).

Cominco's previous request for a stay of EPA's February 8, 2000, Order to Cominco included discussion of the need to complete weather-limited construction activities in order to avoid delay in completing the Production Rate Increase Project. Many of the activities identified by Mr. Hartig in the March 1, 2000 letter to Julianne Matthews to support Cominco's request for a stay of the February 8, 2000 Order are not allowed under this policy or the Act. However, upon careful consideration and in recognition of the unique weather-related construction limitations at the Red Dog site, EPA issued the Amended Order on March 7, 2000. The Amended Order, at paragraph 52.a., specified that many of the activities enumerated in the March 1 letter are not prohibited under the Order. These activities include, for example, the off-site assembly of the MG-17 engine and associated module, and transportation of it to the Mine site. In Cominco's Response in Opposition to EPA's Motion to Dismiss, the company contends that "the EPA Amended Order does not permit Cominco to place the generator and its module on the foundation." Response at p. 15.

Upon review of the Amended Order, EPA does not believe this to be the case. Since transport of the MG-17 module to the Red Dog Mine site and construction of the foundation are specifically not prohibited by paragraph 52a., and because on-site storage of equipment is allowed under the Act, EPA considers the Amended Order to include storage of the module on its foundation as long as it is not attached to the foundation. However, because placement on the foundation was not specifically listed EPA understands Cominco's apparent confusion on this point. Therefore, it is EPA's position that the Amended Order does not prohibit Cominco from engaging in summer dependant construction activities, specifically, pouring concrete, transporting the generator in its module to the site and storing the module on its foundation.

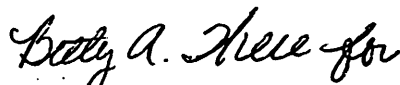
Regarding the installation and connection of services to the module, EPA had not anticipated allowing this activity previously. In his March 14, 2000, letter, Mr. Hartig also requests authorization to connect the glycol loop from the existing powerhouse to the MG-17 module, to tie the facility's fire protection system in to the MG-17 module, and to connect electrical services in the module that would allow operation of the other equipment at the Red Dog Mine facility. These types of activities constitute unauthorized pre-permit construction activities under the Clean Air Act. Thus, neither this letter, nor the Amended Order authorize the integration of the facility's heating, plumbing, or other electrical services with the components of the MG-17 module prior to Cominco's receipt of a

valid PSD permit from ADEC.

Finally, you also requested that EPA stay the December 10, 1999, Order issued to ADEC. As seen in the enclosed letter, on April 25, 2000, EPA withdrew the Order to ADEC. Importantly however, and as explained in the letter withdrawing the Order, EPA still believes that the final PSD permit issued to Cominco is not in compliance with the Clean Air Act or the Alaska SIP. Thus, the December 10, 1999, and February 8, 2000, Findings under Section 113(a)(5) remain unchanged.

EPA continues to be willing to discuss the Cominco permit with you and ADEC in order to resolve the remaining issues. Please contact Doug Hardesty, Manager, Federal and Delegated Air Programs Unit, at (206) 553-6641, if you have further questions regarding the March 7, 2000, Order or wish to resume discussions regarding the permit.

Sincerely,



Barbara McAllister, Director
Office of Air Quality

Enclosure

cc: Michele Brown, ADEC
Larry Hartig, Counsel for Cominco



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

APR 25 2000

Reply To
Attn Of: OAQ-107

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Michele Brown
Alaska Department of Environmental Conservation
410 Willoughby Avenue, Suite 105
Juneau, Alaska 99801-1795

Re: December 10, 1999 Finding of Noncompliance and Order

Dear Ms. Brown:

The U.S. Environmental Protection Agency (EPA) Region 10 hereby withdraws the Order it issued to the Alaska Department of Environmental Conservation (ADEC) on December 10, 1999. As explained in the December 10, 1999 Finding of Noncompliance and Order and in the cover letter accompanying the Order, Region 10 issued the Order because the PSD permit ADEC proposed to issue to Cominco Alaska's Red Dog Mine did not meet certain conditions that EPA believes are necessary in order for the permit to comply with requirements of the Clean Air Act. Unfortunately, our offices reached an impasse in efforts to resolve the issue. In order to prevent construction at the Red Dog mine that EPA believed would constitute noncompliance with the Act, Region 10 issued the Clean Air Act Section 167 Order instructing the state not to issue a permit authorizing that improper construction.

The Section 167 Order portion of the December 10, 1999 document contained two relevant elements: (1) ADEC was instructed not to issue the permit without certain modifications or documentation (regarding, namely, BACT for the MG-17 generator), and (2) in the event that ADEC had already issued the permit to Cominco at the time ADEC received EPA's Order, ADEC was directed to retract or render the permit ineffective until EPA concurred that ADEC's permit terms complied with the Clean Air Act. As EPA understands it, shortly after receiving EPA's Order, ADEC issued the permit approving the production rate increase project at the mine. Because ADEC issued the permit after it received the Order, the Order does not impose any continuing prohibitions or obligations applicable to ADEC. Thus, EPA does not believe that

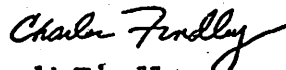
justice is served by maintaining the Order and therefore withdraws it.

Withdrawal of the Order should also alleviate your concern regarding potential liability of state employees. As EPA has stated before, is not EPA's practice to name individual State employees when a particular State or State agency is identified as a defendant in a civil action to enforce the Clean Air Act. EPA does not intend to impose sanctions against individual State employees in this matter.

Importantly, as stated in my February 8, 2000 letter to you, EPA still believes that the final PSD permit issued to Cominco is not in compliance with the Clean Air Act or the Alaska SIP. Region 10 is withdrawing only the Order portion of the December 10, 1999 document. Thus, the December 10, 1999 and February 8, 2000 Findings under Section 113(a)(5) remain unchanged, as does the March 7, 2000 Order issued to Cominco. EPA continues to be willing to discuss further the Cominco permit with ADEC and Cominco in order to resolve the remaining issues.

Please do not hesitate to contact me if you have any questions or wish to discuss the Cominco permit further.

Sincerely,



Chuck Findley

Deputy Regional Administrator

cc: C. Lenard, State of Alaska, Attorney General's Office
S. Lowrance, EPA
J. Seitz, EPA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

MEMORANDUM

DATE: December 18, 1978

SUBJECT: Interpretation of "Constructed" as it Applies to Activities
Undertaken Prior to Issuance of a PSD Permit

FROM: Director Division of Stationary Source Enforcement

TO: Enforcement Division Directors Regions I-X

Air and Hazardous Materials Division Directors Regions I-X

The issue addressed in this memorandum is where on the continuum from planning to operation of a major emitting facility does a company or other entity violate the PSD regulations if it has not yet received a PSD permit. (It is assumed here that such a permit is required by the PSD regulations.) This question has arisen several times in particular cases and general guidance now appears necessary.

The statute and regulations do not answer this question. The Clean Air Act states simply that, "[n]o major emitting facility ... may be constructed ... unless - (1) a permit has been issued ... [and various other conditions have been satisfied]." Section 165(a). Similarly, the PSD regulations state that, "[n]o major stationary source or major modification shall be constructed unless the [various PSD requirements are met]." 40 CFR 52.21(i)(1), 43 FR 26406. "Construction" is defined in the regulations as "fabrication, erection, installation, or modification of a source." 40 CFR 52.21(b) (7), 43 FR 26404. This accords with Section 169 (2) (C) of the Act, but it does not explicitly answer the question posed above. To our knowledge, the legislative history of the Act does not treat this issue. Thus the term "constructed" seems to be open to further interpretation by EPA.

Commencement of construction is quite specifically defined in both Section 169(2)(A) of the Clean Air Act and 40 CFR 52.21(b)(8), 43 FR 26404. However, that definition is for the purpose of deciding the threshold question of the applicability of the PSD regulations. Therefore, we are not bound by it in deciding what activities may be conducted prior to receiving a necessary PSD permit.

DSSE's response to date has been that the permitting authority should make the determination on a case-by-case basis, after considering all the facts of the individual situation. For example, we said that site clearing might be inappropriate for a source proposed to be constructed in a heavily forested Class I area, but permissible for a source proposed to be constructed on a junk-strewn lot in a heavily industrialized Class III area.

After consulting with the Office of General Counsel, we are now amending this policy in order to minimize the administrative burden on the permitting authority and to adopt what we believe now to be the better legal interpretation. The new policy is that certain limited activities will be allowed in all cases. These allowable activities are planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials. Any activities undertaken prior to issuance of a PSD permit would, of course, be solely at the owner's or operator's risk. That is, even if considerable expense were incurred in site-clearing and purchasing equipment, for example, there would no guarantee that a PSD permit would be forthcoming. All on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances. These prohibited activities include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature.

The new policy has several advantages. First, it will be easy to administer, since case-by-case determinations will not be required. Moreover, it assures national consistency and permits no abuse of discretion. Finally, it appears to be the most legally correct position. The policy has the undeniable disadvantage of allowing a good deal of

activity at sites which may be highly susceptible to environmental impact. We feel that on balance, however, the advantages of the policy outweigh the disadvantage.

If you any questions, please feel free to contact David Rochlin of my staff, at 755-2542.

Edward E. Reich

cc: Peter Wyckoff, OGC
Richard Rhoades, OAQPS
Linda Murphy, Region I
Ken Eng, Region II
Jim Sydnor, Region III
Winston Smith, Region IV
Steve Rothblatt, Region V
Don Harvey, Region VI
Bob Chanslor, Region VII
Dave Joseph, Region VIII
Bill Wick, Region IX
Mike Johnston, Region X